

# **EXHIBIT 5**

**From:** Joseph Gratz  
**Sent:** Thursday, October 21, 2010 10:11 AM  
**To:** Johanna Schmitt  
**Cc:** Brendan T. Kehoe; Sonali Maitra  
**Subject:** RE: Tetris v. Xio

Johanna,

I am writing to answer your follow-up questions below.

1. The inadvertent inclusion of the privileged documents resulted from a number of technical errors, which we are still investigating. It appears that many of the documents were not located by our keyword searches for potentially privileged documents, for one of a number of reasons. For a number of the documents, it was because they were client emails in which the clients misspelled the name of our law firm – as “Duri Tangri,” “Durie Tangi,” or “Duri Tangi.” For a number of the documents, it was because it appears that the “cc” field was erroneously omitted from the portions of the message searched for privilege keywords. For a number of the documents, it was because they were client emails in which the clients referred to Durie Tangri attorneys either only by first name or without using names at all, and without using the name of the firm. Some privileged documents were not marked as such by the client, and did not mention any attorneys by name, and thus were not located by keyword privilege searches. And it appears that a small number of documents matching the privilege terms were erroneously produced as a result of human error in operating Concordance, the software being used for the review. As I said, our investigation is ongoing, but it appears that the factors listed above account for most of the documents clawed back.
2. We can see a number of ways of resolving this issue while addressing your concern about creating uncertainty over which documents are removed from production as not containing certain keywords. Please be prepared to discuss this issue on our call today.
3. We are not presently clawing back any documents produced by third-party subpoena recipients, and we do not presently anticipate doing so. Have you encountered any apparently privileged documents in your review of those productions?

Joe

**From:** Johanna Schmitt [\[mailto:johanna.schmitt@kirkland.com\]](mailto:johanna.schmitt@kirkland.com)  
**Sent:** Thursday, October 21, 2010 7:47 AM  
**To:** Joseph Gratz  
**Cc:** Brendan T. Kehoe; Sonali Maitra  
**Subject:** RE: Tetris v. Xio

Joe,

We will remove the documents that you identified below from our attorney review database and destroy any copies of them (other than the copy that was in the .zip file, which is maintained strictly by our technical team).

As I stated in my earlier email, we are taking these steps as a courtesy to Xio while we continue to discuss the issue with you. Our clients reserve all rights regarding whether the disclosure of more than

100 documents that Xio now claims are privileged was inadvertent or whether the privilege has been waived. In order to further evaluate this issue, we have several follow up questions.

- First, you state that there was an "inadvertent technical error" that led to Xio producing the documents. In order for us to evaluate whether, under the protective order, Xio exercised "reasonable care" in preventing disclosure of the documents, please explain in detail precisely what the technical error was.
- 
- In addition, you claim that the disclosure of more than 100 privileged documents constituted a small portion of Xio's overall production. However, as we have already identified, it appears that Xio produced tens of thousands (if not more than 100,000) non-responsive documents in error as a result of misapplying Xio's search terms. In order for us to determine what percentage of Xio's overall production included documents that Xio is now claiming are privileged, Xio must produce its revised set of responsive documents. I am still waiting for a response to my October 18th email to Sonali and you on this subject. Please let us know when we can expect Xio's revised production so we can begin a meaningful review of Xio's production and prepare for depositions.
- 
- Lastly, have you checked to see whether any documents that Xio is claiming are privileged were produced as part of the third-party productions of Rus, Haro, and Ude? If there were documents contained in those productions that Xio claims are privileged, please identify them immediately.

- Johanna

**Johanna Schmitt** / [KIRKLAND & ELLIS LLP](#)  
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Joseph Gratz <[JGratz@durietangri.com](mailto:JGratz@durietangri.com)>

10/20/2010 04:17 PM

To Johanna Schmitt <[johanna.schmitt@kirkland.com](mailto:johanna.schmitt@kirkland.com)>  
cc "Brendan T. Kehoe" <[brendan.kehoe@kirkland.com](mailto:brendan.kehoe@kirkland.com)>, Sonali Maitra  
<[SMaitra@durietangri.com](mailto:SMaitra@durietangri.com)>

Subject RE: Tetris v. Xio

Johanna,

As Sonali stated in an email of earlier this morning, there appears to have been an inadvertent technical error leading to the production of certain documents over which Xio intends to assert privilege. We appreciate your professional courtesy in accommodating this "clawback." The following documents, making up less than one tenth of one percent of Xio's production, were inadvertently produced, should not be reviewed, and should be destroyed immediately.

XIO-DG-0001195  
XIO-DG-0001675  
XIO-DG-0001766  
XIO-DG-0001876  
XIO-DG-0001897  
XIO-DG-0001904  
XIO-DG-0001932  
XIO-DG-0002051

XIO-DG-0002062  
XIO-DG-0002111  
XIO-DG-0002116  
XIO-DG-0002141  
XIO-DG-0002147  
XIO-DG-0002152  
XIO-DG-0002298  
XIO-DG-0002353  
XIO-DG-0002722  
XIO-DG-0003039  
XIO-DG-0006576  
XIO-DG-0007901  
XIO-DG-0008032  
XIO-DG-0008795  
XIO-DG-0012625  
XIO-DG-0012628  
XIO-DG-0012649  
XIO-DG-0012651  
XIO-DG-0012652  
XIO-DG-0012812  
XIO-DG-0012815  
XIO-DG-0012823  
XIO-DG-0012899  
XIO-DG-0012927  
XIO-DG-0014482  
XIO-DG-0015165  
XIO-DG-0015169  
XIO-DG-0016034  
XIO-DG-0016069  
XIO-DG-0016403  
XIO-DG-0016590  
XIO-DG-0016591  
XIO-DG-0016593  
XIO-DG-0017393  
XIO-DG-0017428  
XIO-DG-0017534  
XIO-DG-0017558  
XIO-DG-0017580  
XIO-DG-0017619  
XIO-DG-0017625  
XIO-DG-0018195  
XIO-DG-0018214  
XIO-DG-0018246  
XIO-DG-0018259  
XIO-DG-0018268  
XIO-DG-0018516  
XIO-DG-0018652  
XIO-DG-0019185  
XIO-DG-0019186  
XIO-DG-0019385  
XIO-DG-0019595  
XIO-DG-0019596  
XIO-DG-0019601

XIO-DG-0019955  
XIO-DG-0019956  
XIO-DG-0023661  
XIO-DG-0023781  
XIO-DG-0024035  
XIO-DG-0024037  
XIO-DG-0024054  
XIO-DG-0024081  
XIO-DG-0024085  
XIO-DG-0024089  
XIO-DG-0024173  
XIO-DG-0024670  
XIO-DG-0025226  
XIO-DG-0031199  
XIO-DG-0031232  
XIO-HD-DG-0007339  
XIO-HD-DG-0013253  
XIO-HD-DG-0016147  
XIO-HD-DG-0016148  
XIO-HD-DG-0016218  
XIO-HD-DG-0016845  
XIO-HD-XIO-0000014  
XIO-HD-XIO-0000021  
XIO-HD-XIO-0000039  
XIO-HD-XIO-0000043  
XIO-HD-XIO-0001455  
XIO-HD-XIO-0001484  
XIO-HD-XIO-0001593  
XIO-HD-XIO-K-0000010  
XIO-HD-XIO-K-0000019  
XIO-MC-0065942  
XIO-MH-0026847  
XIO-MH-0027063  
XIO-MH-0027173  
XIO-MH-0040651  
XIO-HD-DG-010000000006  
XIO-HD-DG-010000000007  
XIO-HD-DG-010000000008  
XIO-HD-DG-010000000009  
XIO-HD-DG-010000000010  
XIO-HD-DG-010000000013  
XIO-HD-DG-010000000015  
XIO-HD-DG-010000000016  
XIO-HD-DG-010000000018  
XIO-HD-DG-010000000019  
XIO-HD-DG-010000000020  
XIO-HD-DG-010000000022  
XIO-HD-DG-010000000023  
XIO-HD-DG-010000000024  
XIO-HD-DG-010000000025  
XIO-HD-DG-010000000026  
XIO-HD-DG-010000000028  
XIO-HD-MH-010000000005

As Sonali stated, Xio does not waive any privilege or other protection with respect to these documents, and explicitly reserves all its rights. If there is anything else we can provide to assist in your deletion of the above documents, such as a Concordance or Summation load file or a CSV file containing the above-listed Bates numbers, please let me know.

Tetris may continue with its review of the documents not listed above. Note that some of the documents that Tetris listed in its email of this morning, such as published law review articles and copies of published court rulings, are not documents over which Xio asserts privilege, and are not listed above.

Once again, thank you for your professional courtesy in your handling of this matter.

Joseph Gratz  
Durie Tangri LLP  
[jgratz@durietangri.com](mailto:jgratz@durietangri.com)/ 415-362-6666

**From:** Johanna Schmitt [<mailto:johanna.schmitt@kirkland.com>]  
**Sent:** Wednesday, October 20, 2010 8:51 AM  
**To:** Sonali Maitra  
**Cc:** Brendan T. Kehoe; Joseph Gratz  
**Subject:** RE: Tetris v. Xio

Sonali,

In light of your email below, we will halt review of Xio's production until we hear from you later today. In addition, we have removed the documents that I had identified in my email to you from our attorney review database and destroyed any additional copies. We have, however, retained one copy of each of the .zip files that Xio has produced to TTC. The .zip files are maintained by our technical team and are not accessible by the attorneys or others.

We note that our compliance with your request is a courtesy while we try to resolve this issue in good faith. It does not mean that we agree that the disclosure was inadvertent. We reserve all rights to assert that the privilege has been waived.

We look forward to hearing from you.

- Johanna

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**Sonali Maitra**  
<[SMaitra@durietangri.com](mailto:SMaitra@durietangri.com)>

10/20/2010 11:20 AM

To Johanna Schmitt <[johanna.schmitt@kirkland.com](mailto:johanna.schmitt@kirkland.com)>  
cc Joseph Gratz <[JGratz@durietangri.com](mailto:JGratz@durietangri.com)>, "Brendan T. Kehoe"  
<[brendan.kehoe@kirkland.com](mailto:brendan.kehoe@kirkland.com)>  
Subject RE: Tetris v. Xio

Johanna,

Please halt review of Xio's production and destroy the below-mentioned documents immediately. We believe there has been a technical error that resulted in the production of privileged documents. We do not waive privilege, and we are clawing back the below-mentioned documents immediately. We are investigating the matter further and will get back to you today. In the meantime, and again, please halt review of Xio's production.

Sonali  
Durie Tangri LLP

**From:** Johanna Schmitt [<mailto:johanna.schmitt@kirkland.com>]  
**Sent:** Wednesday, October 20, 2010 7:56 AM  
**To:** Sonali Maitra  
**Cc:** Joseph Gratz; Brendan T. Kehoe  
**Subject:** Tetris v. Xio

Sonali,

As you know, we have had serious issues with Xio's document production, which has delayed plaintiffs from conducting a meaningful review of Xio's documents. That said, we have been able to review certain portions of it.

In the course of our preliminary review, we have found many documents that may contain (either in whole or in part) privileged information. The Bates-numbers of these documents are listed below. We assume that these documents may be the tip of the iceberg and that we will find many more such documents in the course of our review.

You have informed us that Xio did not conduct a page-by-page review of the documents for privileged materials, but instead conducted "various" (unspecified) electronic searches for privileged documents. Given the number and scope of potentially privileged materials that were produced to us, Xio clearly "failed to exercise reasonable care" in preventing disclosure of this information as required by paragraph 13 of the protective order. *See also Bense v. Air Line Pilots Assn*, 248 F.R.D. 177, 180-81 (D.N.J. 2008) (holding that the privilege was waived because the producing party did not take reasonable precautions to prevent the disclosure of documents that, among other things, had the law firm's name on them). Further, it is not our duty to conduct Xio's privilege review for it (just like it is not our job to review Xio's documents to determine what are responsive documents versus junk email).

As such, we will consider any privilege covering information in these documents--as well as in any other documents that Xio has produced--as waived by Xio.

- Johanna

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XIO-DG-0016404  
XIO-DG-0200371  
XIO-DG-0200375  
XIO-DG-0200378  
XIO-DG-0200402

XIO-DG-0200413  
XIO-DG-0200414  
XIO-MB-0200134  
XIO-MB-0200135  
XIO-MC-0065442  
XIO-MC-0080597  
XIO-MC-0094882  
XIO-MC-0200516  
XIO-MC-0200519  
XIO-MC-0200534  
XIO-MC-0200548  
XIO-MC-0200549  
XIO-MH-0200159  
XIO-MH-0200160  
XIO-HD-MH-010000000005  
XIO-HD-DG-0013159  
XIO-HD-DG-0016174  
XIO-HD-DG-0016182  
XIO-HD-DG-0016199  
XIO-HD-DG-0016631  
XIO-HD-DG-010000000007  
XIO-HD-DG-010000000010  
XIO-HD-DG-010000000013  
XIO-HD-DG-010000000015  
XIO-HD-DG-010000000016  
XIO-HD-DG-010000000018  
XIO-HD-DG-010000000019  
XIO-HD-DG-010000000020  
XIO-HD-DG-010000000022  
XIO-HD-DG-010000000023  
XIO-HD-DG-010000000024  
XIO-HD-DG-010000000025  
XIO-HD-DG-010000000026  
XIO-HD-DG-010000000028  
XIO-HD-XIO-0000033  
XIO-HD-XIO-0001423  
XIO-HD-XIO-0001580

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\_\_\_\_\_ Information from ESET NOD32 Antivirus, version of virus signature database 5546  
(20101019) \_\_\_\_\_

The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>

\_\_\_\_\_ Information from ESET NOD32 Antivirus, version of virus signature database 5546  
(20101019) \_\_\_\_\_

The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>

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\_\_\_\_\_ Information from ESET NOD32 Antivirus, version of virus signature database 5552

(20101021) \_\_\_\_\_

The message was checked by ESET NOD32 Antivirus.

<http://www.eset.com>

\_\_\_\_\_ Information from ESET NOD32 Antivirus, version of virus signature database 6081  
(20110429) \_\_\_\_\_

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